

1 IN THE UNITED STATES DISTRICT COURT  
2 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
3

4 AETNA LIFE INSURANCE COMPANY, on No. C 11-0439 CW  
behalf of LEHMAN BROTHERS  
5 HOLDINGS, INC..

6 Plaintiff,

7 v.

8 THOMAS KOHLER and DIANE KIMSEU  
9 KOHLER,

10 Defendants.

11 ORDER GRANTING  
12 PLAINTIFF'S MOTION  
13 FOR SUMMARY  
14 JUDGMENT AND  
15 DENYING AS MOOT  
16 PLAINTIFF'S MOTION  
17 TO STRIKE PORTIONS  
18 OF THE DECLARATION  
19 OF ANDREW KLIMENKO  
(Docket Nos. 35  
and 45)

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20 Plaintiff Aetna Life Insurance Company, on behalf of Lehman  
21 Brothers Holdings, Inc., moves for summary judgment on its claim  
22 under section 502(a)(3) of the Employment Retirement Insurance  
23 Security Act (ERISA), 29 U.S.C. § 1132(a)(3), to recover funds  
24 from Defendants Thomas Kohler and Diane Kimeseu Kohler.

25 Defendants oppose the motion. Aetna also moves to strike portions  
26 of a declaration submitted by Defendants in support of their  
27 opposition. Having considered the papers submitted by the parties  
28 and their oral arguments, the Court GRANTS Aetna's motion for  
summary judgment and DENIES as moot Aetna's motion to strike.

29 BACKGROUND

30 Aetna is the administrator and fiduciary of the Lehman  
31 Brothers Holdings, Inc. Benefit Plan, a self-funded plan governed  
32 by ERISA. Ms. Kimseu Kohler was employed by Lehman Brothers and  
33 was a participant under the Plan. Mr. Kohler, her husband, was a

1 covered dependent under the Plan. In relevant portion, the  
2 Summary Plan Description (SPD) provides

3 Subrogation

4 Immediately upon paying or providing any benefits under  
5 this plan, the plan shall be subrogated to (stand in the  
6 place of) all rights of recovery a Covered Person has  
7 against any Responsible Party with respect to any  
8 payment made by the Responsible Party to a Covered  
9 Person due to a Covered Person's injury, illness, or  
10 condition to the full extent of benefits provided or to  
11 be provided by the plan.

12 Reimbursement

13 In addition, if a Covered Person receives any payment  
14 from any Responsible Party or Insurance Coverage as a  
15 result of an injury, illness, or condition, the plan has  
16 a right to receive from, and be reimbursed by, the  
17 Covered Person for all amounts this plan has paid and  
18 will pay as a result of that injury, illness, or  
19 condition, up to and including the full amount the  
20 Covered Person receives from any Responsible Party.

21 Constructive Trust

22 By accepting benefits (whether the payment of such  
23 benefits is made to the Covered Person or made on behalf  
24 of the Covered Person to any provider) from the plan,  
25 the Covered Person agrees that if he or she receives any  
payment from any Responsible Party as a result of an  
injury, illness, or condition, he or she will serve as a  
constructive trustee over the funds that constitutes  
[sic] such payment. Failure to hold such funds in trust  
will be deemed a breach of the Covered Person's  
fiduciary duty to the plan.

26 Lien Rights

27 Further, the plan will automatically have a lien to the  
28 extent of benefits paid by the plan for the treatment of  
the illness, injury, or condition for which the  
Responsible Party is liable. The lien shall be imposed  
upon any recovery whether by settlement, judgment, or  
otherwise related to the treatment for any illness,  
injury, or condition for which the plan paid benefits.  
The lien may be enforced against any party who possesses  
the funds or proceeds representing the amount of  
benefits paid by the plan including, but not limited to,  
the Covered Person, the Covered Person's representative  
or agent; Responsible Party; Responsible Party's

1                   insurer, representative, or agent; and/or any other  
2                   source possessing funds representing the amount of the  
3                   benefits paid by the plan.

4                   First-Priority Claim

5                   By accepting benefits (whether the payment of such  
6                   benefits is made to the Covered Person or made on behalf  
7                   of the Covered Person to any provider) from the plan,  
8                   the Covered Person acknowledges that this plan's  
9                   recovery rights are a first priority claim against all  
10                  Responsible Parties and are to be paid to the plan  
11                  before any other claim for the Covered Person's damages.  
12                  This plan shall be entitled to full reimbursement on a  
13                  first-dollar basis from any Responsible Party's  
14                  payments, even if such payment to the plan will result  
15                  in a recovery to the Covered Person which is  
16                  insufficient to make the Covered Person whole or to  
17                  compensate the Covered Person in part or in whole for  
18                  the damages sustained. The plan is not required to  
19                  participate in or pay court costs or attorneys fees to  
20                  any attorney hired by the Covered Person to pursue the  
21                  Covered Person's damage claim.

22                  Cooperation

23                  The Covered Person shall fully cooperate with the plan's  
24                  efforts to recover its benefits paid. It is the duty of  
25                  the Covered Person to notify the plan within 30 days of  
26                  the date when any notice is given to any party,  
27                  including an insurance company or attorney, of the  
28                  Covered Person's intention to pursue or investigate a  
                      claim to recover damages or obtain compensation due to  
                      injury, illness, or condition sustained by the Covered  
                      Person. The Covered Person and his or her agents shall  
                      provide all information requested by the plan, the  
                      Claims Administrator or its representative including,  
                      but not limited to, completing and submitting any  
                      applications or other forms or statements as the plan  
                      may reasonably request. Failure to provide this  
                      information may result in the termination of health  
                      benefits for the Covered Person or the institution of  
                      court proceedings against the Covered Person.

29                  The Covered Person shall do nothing to prejudice the  
30                  plan's subrogation or recovery interest or to prejudice  
31                  the plan's ability to enforce the terms of this plan  
32                  provision. This includes, but is not limited to,  
33                  refraining from making any settlement or recovery that  
34                  attempts to reduce or exclude the full cost of all  
35                  benefits provided by the plan.

United States District Court  
For the Northern District of California

1 Decl. of Kate Mellor in Supp. for Pl.'s Mot. for Summ. J. (Mellor  
2 Decl.) ¶ 4, Ex. A, at 40-41.

3 On July 4, 2008, Defendant Thomas Kohler suffered severe  
4 injuries when Lise Warren made an illegal u-turn and hit his  
5 motorcycle. Compl. ¶ 13; Answer ¶ 13; Defs.' Opp. to Pl.'s Mot.  
6 for Summ. J. (Opp.) at 2; Decl. of Andrew Klimenko in Supp. of  
7 Defs.' Opp. to Pl.'s Mot. for Summ. J. (Klimenko Decl.) ¶ 11, Exs.  
8 A-C, G. As a result of the accident, Mr. Kohler has required  
9 extensive medical treatment; he was hospitalized for eleven days,  
10 continues to suffer numerous health problems, and will likely  
11 undergo additional surgeries in the future. Opp. at 2; Klimenko  
12 Decl. ¶ 11, Exs. C, E, G. Kohler also suffered lost wages and the  
13 loss of his motorcycle. Klimenko Decl. ¶ 11, Ex. G. In total,  
14 Mr. Kohler's medical expenses were approximately \$173,910.32.  
15 Klimenko Decl. ¶ 11, Ex. H. Aetna paid approximately \$146,998.90  
16 to \$147,986.76 of these costs;<sup>1</sup> the remainder were paid by another  
17 insurer. Klimenko Decl. ¶ 11, Exs. H, L.

18 In a letter dated November 11, 2008, the Rawlings Company,  
19 LLC, on behalf of Aetna, notified Mr. Kohler of his duty to inform  
20 Aetna of any claim he intended to bring based on the July 2008  
21 accident. Decl. of Denise M. Harris in Supp. of Pl.'s Mot. for

22  
23  
24  
25 <sup>1</sup> Defendants' exhibits provide two different amounts for the  
26 medical expenses paid by Aetna on Mr. Kohler's behalf. Klimenko  
27 Decl. ¶ 11, Exs. H, L. The amounts differ by less than one  
28 thousand dollars and both exceed the total amount of the  
settlement fund at issue in this case.

1 Summ. J. (Harris Decl.) ¶ 3, Ex. A. Rawlings also informed Mr.  
2 Kohler that "if you receive a settlement or other payment from any  
3 other insurance company, person, or organization, you may be  
4 required to reimburse the health plan benefits provided as a  
5 result of the incident." Id.

In a letter dated June 11, 2009, Rawlings asked Mr. Kohler again whether he had brought a tort claim against the party responsible for the injuries he had suffered and whether he retained a lawyer. Id. Rawlings informed Mr. Kohler again of Aetna's right to reimbursement. Id. Defendants did not respond, notwithstanding that, on June 24, 2009, they had filed a complaint against Ms. Warren in the California Superior Court for the City and County of San Francisco. Decl. of Clarissa A. Kang in Supp. of Pl.'s Mot. for Summ. J. (Kang Decl.) ¶ 3, Ex. A. In a letter dated September 24, 2009, Mercury Insurance Company, Ms. Warren's insurer, informed Rawlings that litigation had begun on Mr. Kohler's claim and that Christopher Dolan was representing Mr. Kohler. Harris Decl. ¶ 4, Ex. B. The Dolan Law Firm serves as Defendants' counsel in this case.

In a letter dated September 30, 2009, Rawlings notified Andrew Klimenko of The Dolan Law Firm of Aetna's lien for medical benefits paid on behalf of Mr. Kohler on funds that might be obtained through a settlement with Ms. Warren and her insurer. Compl. ¶ 18; Answer ¶ 18; Harris Decl. ¶ 5, Ex. C. On December 9, Defendants responded, asking that Aetna withdraw its lien because

1 Ms. Warren had insufficient policy coverage and personal assets to  
2 make Mr. Kohler whole. Compl. ¶ 19; Answer ¶ 19. After Rawlings  
3 sent Defendants another letter on January 4, 2010 re-asserting  
4 Aetna's right to reimbursement for its payment of medical  
5 expenses, Defendants responded on January 7, 2010, reiterating  
6 their belief that Aetna could not recover any amount from Mr.  
7 Kohler. Compl. ¶¶ 20-21; Answer ¶¶ 20-21; Harris Decl. ¶ 5,  
8 Ex. C. On January 15, 2010, Rawlings again sent Defendants a  
9 letter explaining the legal basis for Aetna's claim for  
10 reimbursement. Compl. ¶ 22; Answer ¶ 22; Harris Decl. ¶ 5, Ex. C.

12 Defendants claim that, on May 20, 2010, their attorney spoke  
13 with Denise Harris of Rawlings and the parties "generally agreed  
14 that, given the limited insurance available, the customary three  
15 way split would be done in which the lien claimant would get 1/3  
16 of the recovery, the attorneys would receive 1/3, and the client  
17 would receive 1/3." Decl. of Shawn R. Miller (Miller Decl.) ¶ 2.<sup>2</sup>

19 On June 16, 2010, Rawlings sent Defendants documentation of  
20 the medical expenses Aetna had paid on behalf of Mr. Kohler and of  
21 the Plan's subrogation and reimbursement language. Klimenko Decl.

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22       <sup>2</sup> Aetna has submitted a declaration from Denise M. Harris,  
23 who attests that "I have never agreed, generally or otherwise,  
24 . . . to any settlement offer to resolve Aetna's lien for amount  
25 paid in benefits for Ms. Kohler," including "through a three-way  
split of the settlement amount in which the lien claimant, the  
attorneys and the Kohlers would each receive one-third of the  
settlement amount." Suppl. Decl. of Denise M. Harris in Supp. of  
Pl.'s Mot. for Summ. J. (Suppl. Harris Decl.) ¶ 3. For the  
purposes of considering Aetna's motion for summary judgment, the  
Court resolves this factual dispute in favor of Defendants as the  
non-moving parties.

¶¶ 5, 6, Ex. L. In this correspondence, Rawlings stated that  
claim reductions were considered on a case-by-case basis and that  
it would consider a reduction at a future time. Id.

On June 28, 2010, Defendants informed Rawlings that they had  
reached a settlement with Ms. Warren and her insurer. Compl.  
¶ 23; Answer ¶ 23; Harris Decl. ¶ 6, Ex. D. Mr. Kohler had sought  
\$2 million from Ms. Warren. Compl. ¶ 21; Answer ¶ 21. Defendants  
told Rawlings that, under the parties' settlement agreement, Mr.  
Kohler would receive \$7,250 from Ms. Warren. Compl. ¶¶ 23, 26,  
Ex. C; Answer ¶¶ 23, 26; Harris Decl. ¶ 6, Ex. D. Although the  
letter did not state this, Ms. Kimseu Kohler would receive  
\$137,750 from Ms. Warren. Compl. ¶¶ 23, 26, Ex. C; Answer ¶¶ 23,  
26; Klimenko Decl. ¶ 4, Ex. I. The total to be recovered by  
Defendants was \$145,000. Defendants have not presented any  
evidence that they consulted Aetna regarding the settlement with  
Ms. Warren prior to entering into it.

Subsequently, Defendants and Aetna participated in a  
mandatory settlement conference in the underlying state court  
action to try to resolve the outstanding medical liens. Klimenko

1 Decl. ¶ 7; Kang Decl. ¶¶ 5-6.<sup>3</sup> A settlement to resolve the lien  
2 was not reached at that time. Klimenko Decl. ¶ 7; Kang Decl. ¶¶  
3 5-6.

4 Aetna filed this action on January 28, 2011, asserting a  
5 claim for equitable relief under section 502(a)(3) of ERISA. In  
6 particular, Aetna asks the Court to impose a "constructive trust  
7 or equitable lien agreement in favor of the Plan upon settlement  
8 proceeds in possession of Defendants." Compl. ¶ 38a. Defendants  
9 filed a motion to dismiss the complaint, which this Court denied  
10 on May 23, 2011. Order Den. Defs.' Mot. to Dismiss and Den. as  
11 Moot Pl.'s Mot. to Strike Portions of Defs.' Mot. to Dismiss.  
12

13 On September 2, 2011, settlement funds totaling \$144,628.56,  
14 plus accumulated interest, held by the San Francisco Superior  
15 Court in the underlying state court civil action, were deposited  
16 into the client trust account for The Dolan Law Firm.<sup>4</sup> The  
17 parties previously stipulated that these funds would be held in  
18 trust in The Dolan Law Firm's client trust account pending final  
19

20 <sup>3</sup> Aetna has asked this Court to strike Paragraph 7 of the  
21 Declaration of Andrew Klimenko, on the grounds that this paragraph  
22 impermissibly sets forth evidence of conduct or statements made  
23 during negotiations to compromise and that it impermissibly  
24 provides an expert opinion of the typical amount for which an  
25 ERISA lien is settled. Pl.'s Reply to Defs.' Opp. to Mot. for  
Summ. J. 11-12 (citing Fed. R. Civ. Pro. 408, 702). Because this  
Court grants Aetna's motion for summary judgment notwithstanding  
this declaration, Aetna's motion to strike is DENIED as moot.

26 <sup>4</sup> With Plaintiff's consent, Defendants used \$371.44 from the  
27 settlement funds to satisfy another provider's lien on a portion  
of the funds. Klimenko Decl. ¶ 8, Ex. M; Pl.'s Mot. for Summ.  
J. 3.

disposition of this proceeding. Stipulation and Order Re Deposit of Disputed Funds.

Defendants' attorneys expended \$2,396.38 in costs in the state court action in investigating, filing suit, conducting written discovery and depositions, and generally litigating the matter until it was resolved through the settlement agreement. Klimenko Decl. ¶ 3, Ex. K. Their fee agreement with Defendants was to have allowed them a contingency fee of one-third of the recovery. Klimenko Decl. ¶ 3, Ex. J.

## LEGAL STANDARD

Summary judgment is properly granted when no genuine and disputed issues of material fact remain, and when, viewing the evidence most favorably to the non-moving party, the movant is clearly entitled to prevail as a matter of law. Fed. R. Civ. P. 56; Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Eisenberg v. Ins. Co. of N. Am., 815 F.2d 1285, 1288-89 (9th Cir. 1987).

The moving party bears the burden of showing that there is no material factual dispute. Therefore, the court must regard as true the opposing party's evidence, if supported by affidavits or other evidentiary material. Celotex, 477 U.S. at 324; Eisenberg, 815 F.2d at 1289. The court must draw all reasonable inferences in favor of the party against whom summary judgment is sought.

1 587 (1986); Intel Corp. v. Hartford Accident & Indem. Co., 952  
2 F.2d 1551, 1558 (9th Cir. 1991).

3 DISCUSSION

4 Section 502(a)(3) of ERISA permits a plan fiduciary to bring  
5 a civil action "(A) to enjoin any act or practice which violates  
6 any provision of this subchapter or the terms of the plan, or (B)  
7 to obtain other appropriate equitable relief (i) to redress such  
8 violations or (ii) to enforce any provisions of this subchapter or  
9 the terms of the plan." 29 U.S.C. § 1132(a)(3).

10  
11 There is no genuine dispute that Defendants violated the  
12 terms of the Plan. Under the terms of the Plan set forth in the  
13 SDP, if Defendants "receive[] any payment from any Responsible  
14 Party . . . as a result of an injury," Defendants were required to  
15 reimburse the Plan "for all amounts this plan has paid and will  
16 pay as a result of that injury, . . . up to and including the full  
17 amount [they] receive[d] from any Responsible Party." Mellor  
18 Decl. ¶ 4, Ex. A, at 40. Further, Defendants were required to  
19 "fully cooperate with the plan's efforts to recover its benefits  
20 paid" and "to notify the plan of [their] intention to pursue or  
21 investigate a claim to recover damages or obtain compensation"  
22 based on Mr. Kohler's injuries within thirty days thereof. Id. at  
23 40-41. Defendants do not dispute that they received \$145,000 as  
24 settlement of their claims related to Mr. Kohler's accident with  
25 Ms. Warren, that Aetna paid more than this amount toward treatment  
26 of Mr. Kohler's injuries, or that they failed to notify Aetna of  
27  
28

1       their lawsuit against Ms. Warren. Further, Defendants structured  
2       their settlement agreement with Ms. Warren to allocate the bulk of  
3       the money to Ms. Kimseu Kohler and a small amount to Mr. Kohler in  
4       a transparent attempt to circumvent Aetna's right to recover  
5       treatment costs, in violation of their duty to cooperate with  
6       Aetna.

7                  Aetna meets the requirements set forth by the Supreme Court's  
8       holding in Sereboff v. Mid-Atl. Med. Servs., 547 U.S. 356 (2006),  
9       to demonstrate that equitable relief is appropriate to redress  
10      these violations. In Sereboff, the Court held that to support a  
11      claim for equitable relief, a plan must "(1) specifically identify  
12      a fund, distinct from the beneficiary's general assets, from which  
13      reimbursement will be taken, and (2) specify a particular share to  
14      which the plan is entitled." Administrative Comm. for Wal-Mart  
15      Stores, Inc. Assocs.' Welfare Plan v. Salazar, 525 F. Supp. 2d  
16      1103, 1111 (D. Ariz. 2007) (citing Sereboff, 547 U.S. at 362-63).  
17      The Plan at issue here clearly identifies the fund that is  
18      distinct from the beneficiary's assets. See Mellor Decl. ¶ 4, Ex.  
19      A, at 40-41 ("any recovery whether by settlement, judgment, or  
20      otherwise related to treatment for any illness, injury, or  
21      condition for which the plan paid benefits," including "any and  
22      all settlements or judgments, even those designated as pain and  
23      suffering, non-economic damages, and/or general damages only").  
24      Aetna seeks money obtained in a settlement between Defendants and  
25      Ms. Warren, which is currently held in a client trust account

1 maintained by Defendants' attorneys and is distinct from  
2 Defendants' assets. The Plan also identifies the particular share  
3 to which the Plan is entitled. See Mellor Decl. ¶ 4, Ex. A, at 40  
4 ("all amounts this plan has paid and will pay as a result of [the]  
5 injury, illness, or condition"). Aetna seeks here to recover the  
6 entire settlement fund, an amount slightly less than the total  
7 that it expended on Mr. Kohler's medical expenses. The Supreme  
8 Court has found similar language to fulfill these requirement.  
9

10 See Sereboff, 547 U.S. at 364 (finding equitable relief  
11 appropriate where the plan specified it was entitled to "[a]ll  
12 recoveries from a third party (whether by lawsuit, settlement, or  
13 otherwise)" in the amount of "that portion of the total recovery  
14 which is due [Mid Atlantic] for benefits paid").

15 The Eleventh Circuit's decision in Popowski v. Parrott, upon  
16 which Defendants rely to argue that Aetna cannot seek to recover  
17 the entire fund, is not to the contrary. 461 F.3d 1367 (11th Cir.  
18 2006). In that decision, the court concluded that, under Sereboff,  
19 a plan's ERISA equitable relief claim failed because the plan's  
20 terms failed to "limit recovery to a specific portion of a  
21 particular fund." Id. at 1374. Here, the Plan does limit Aetna's  
22 claim to a specific portion of an identifiable fund. Thus,  
23 Popowski does not support the existence of an issue of material  
24 fact.

25 Defendants cite several Ninth Circuit cases to argue that the  
26 imposition of a constructive trust is available under section  
27  
28

502(a)(3) only if Aetna establishes fraud or wrong-doing by  
1 Defendants. Defs.' Opp. to Pl.'s Mot. for Summ. J. at 7-9 (citing  
2 Carpenters H & W Trust v. Vonderharr, 384 F. 3d 667, 672-73 (9th  
3 Cir. 2004); Reynolds Metals v. Ellis, 202 F. 3d 1246, 1249 (9th  
4 Cir. 2000); Cement Masons v. Stone, 197 F. 3d 1003, 1007 (9th Cir.  
5 1999); FMC Medical Plan v. Owens, 122 F. 3d 1258, 1261 (9th Cir.  
6 1997)). However, each of these cases predates the Supreme Court's  
7 holding in Sereboff, wherein the Court imposed an equitable lien  
8 in circumstances almost identical to those here and did not  
9 require a showing of fraud or wrongdoing. See Mairena v.  
10 Enterprise Rent-A-Car Hosp. Ins. Plan, 2010 WL 3931098, at \*8  
11 (N.D. Cal.) (stating that the Court in Sereboff "did not indicate  
12 that a plan fiduciary may only be entitled to this remedy if it is  
13 able to show fraud or wrong-doing by the beneficiary"); see also  
14 Hitachi High Techs. Am., Inc. v. Bowler, 455 Mass. 261, 269-70  
15 (2009) (holding that, after the cases which had required a showing  
16 of fraud or wrongdoing were decided, the law has shifted, because  
17 the Court in Sereboff did not require this showing). Further,  
18 Aetna has demonstrated that Defendants engaged in fraud or  
19 wrongdoing by concealing their state court claim against Ms.  
20 Warren from Aetna and by structuring their settlement agreement  
21 with Ms. Warren to try to avoid their obligations to reimburse  
22 Aetna.  
23  
24 Defendants re-assert nearly verbatim several legal arguments  
25 that they raised in their motion to dismiss and that the Court  
26

27  
28 Defendants re-assert nearly verbatim several legal arguments  
that they raised in their motion to dismiss and that the Court

1 rejected at that time. Defendants have not raised any genuine  
2 issues of material fact relevant to these arguments, which fail  
3 for the same reasons that the Court previously explained in its  
4 Order Denying Defendants' Motion to Dismiss.

5 First, Defendants contend Aetna is "not doing equity,"  
6 because the Plan effected a "forced waiver" of their "equitable  
7 defenses, including the make whole doctrine." Opp. at 7. As  
8 explained in this Court's earlier Order, the make-whole doctrine  
9 is not an equitable defense, but is instead a federal common law  
10 rule of contract interpretation that serves as "gap-filler" that  
11 applies only if the contract's subrogation clause is silent with  
12 respect to the insured's right to be made whole before the insurer  
13 may obtain reimbursement for benefits paid. Here, the undisputed  
14 facts establish that the "First-Priority Claim" provision of the  
15 SPD provides that the Plan is entitled "to full reimbursement on a  
16 first-dollar basis from any Responsible Party's payments, even if  
17 such payment to the plan will result in a recovery to the Covered  
18 Person which is insufficient to make the Covered Person whole or  
19 to compensate the Covered Person in part or in whole for the  
20 damages sustained." Mellor Decl. ¶ 4, Ex. A, at 41. This  
21 language obviates the need to resort to the gap-filling make-whole  
22 doctrine. Applying federal common law to override the Plan's  
23 express and controlling terms would frustrate ERISA's "repeatedly  
24 emphasized purpose to protect contractually defined benefits."  
25  
26  
27  
28 Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 148

1 (1985). Defendants do not identify any authority that precludes  
2 Aetna from seeking equitable remedies simply because Aetna's  
3 recovery would exhaust settlement proceeds. Thus, that Defendants  
4 may not be made whole or may not recover any settlement proceeds  
5 does not create a dispute of material fact.

6 Defendants also argue that Aetna is not "doing equity"  
7 because, under the "common fund doctrine," their counsel's right  
8 to fees should take priority over Aetna's claim. Under this  
9 doctrine, "'a litigant or a lawyer who recovers a common fund for  
10 the benefit of persons other than himself or his client is  
11 entitled to a reasonable attorney's fee from the fund as a  
12 whole.'" Staton v. Boeing Co., 327 F.3d 938, 967 (9th Cir. 2003)  
13 (quoting Boeing Co. v. Van Gemert, 444 U.S. 472, 478 (1980)).  
14 However, the Plan's terms provide that, if a party accepted  
15 benefits, that party agreed that the Plan "is not required to  
16 participate in or pay court costs or attorneys fees to any  
17 attorney hired by the Covered Person to pursue the Covered  
18 Person's damage claim." Mellor Decl. ¶ 4, Ex. A, at 41.  
19 Defendants acknowledge that they hired their attorney to pursue  
20 their damage claim in state court. Opp. at 6. Thus, their  
21 attorneys' fees are covered by this term of the Plan and the  
22 common fund doctrine does not interfere with Aetna's right to  
23 recovery.

24 While the Court recognizes that Mr. Kohler has suffered  
25 serious and tragic injuries, the Court cannot conclude that the  
26

1 balancing of equities in this case requires application of the  
2 make whole doctrine or any other equitable principle to defeat the  
3 Plan's unambiguous reimbursement provisions. Denying Aetna its  
4 right to reimbursement would harm other plan members and  
5 beneficiaries by reducing the funds available to pay their present  
6 and future claims and damaging the Plan's financial viability.  
7

8 See Zurich Amer. Ins. Co. v. O'Hara, Ross & Pines LLC, 604 F.3d  
9 1232, 1237-38 (11th Cir. 2010). Moreover, the record demonstrates  
10 that Defendants engaged in bad faith conduct by refusing to  
11 involve Aetna in the resolution of their claim with Ms. Warren and  
12 structuring their settlement with her in a transparent attempt to  
13 preclude Aetna from exercising its right to reimbursement. Thus,  
14 any inequity in this case would derive from allowing Defendants to  
15 take benefits from the Plan, settle with Ms. Warren in bad faith  
16 and then invoke common law principles to justify refusing to  
17 follow their contractual obligations toward Aetna. See Ryan v.  
18 Fed. Express Corp., 78 F.3d 123, 127-28 (3d Cir. 1996).

19 Defendants also argue that Aetna may not recover any amount  
20 from Ms. Kimseu Kohler because she is not a "Covered Person" as  
21 defined by the Plan. However, the Plan provides that a "lien may  
22 be enforced against any party who possesses the funds or proceeds  
23 representing the amount of benefits paid by the plan including,  
24 but not limited to, the Covered Person, . . . and/or any other  
25 source possessing funds representing the amount of the benefits  
26 paid by the plan." Mellor Decl. ¶ 4, Ex. A, at 41. Ms. Kimseu  
27  
28

1 Kohler received amounts under the settlement agreement, as a  
2 result of the traffic accident and injuries to Mr. Kohler.

3 Klimenko Decl. ¶ 11, Ex. I. Thus, there is no genuine issue of  
4 fact as to Aetna's right to recover from Ms. Kimseu Kohler.

5 Defendants contend that Aetna should recover no more than an  
6 amount proportional to what Defendants received in the settlement  
7 in relation to what they valued Mr. Kohler's claim to be. They  
8 cite Arkansas Department of Health Services v. Ahlborn, 547 U.S.  
9 268 (2006), which concerned a state health agency's lien against a  
10 Medicaid recipient's settlement proceeds. However, Defendants  
11 identify nothing in the Ahlborn decision that creates an issue of  
12 material fact or otherwise undermines Aetna's claim.

13 Defendants also contend that Aetna should be precluded from  
14 recovery because Aetna seeks to recover "amounts in excess of the  
15 out-of-pocket maximums allowed per year pursuant to the SPD,"  
16 which Defendants argue violates the terms of the SPD. Opp. at 11.  
17 However, the SPD states that the maximum amount Aetna may recover  
18 is the amount that the Plan paid for the covered person's medical  
19 treatment, not the out-of-pocket maximum, which is the maximum  
20 amount a covered person must pay for medical treatment himself  
21 before the Plan pays the full cost of medical treatment. Mellor  
22 Decl. ¶ 4, Ex. A, at 40. This argument does not create a genuine  
23 issue of material fact and does not prevent Aetna's recovery as a  
24 matter of law.

1 Defendants further argue that the Plan's reimbursement  
2 provisions are obscure and made to appear unimportant, and that  
3 this violates 29 CFR § 2520.102-2(b), which states, "Any  
4 description of exception, limitations, reductions, and other  
5 restrictions of plan benefits shall not be minimized, rendered  
6 obscure or otherwise made to appear unimportant." However,  
7 Defendants cite no authority that applies this subsection to  
8 reimbursement provisions, and there is no dispute as to whether  
9 Aetna paid the plan benefits to which Mr. Kohler was entitled.  
10 Further, the provisions at issue are printed in the same size and  
11 font as other parts of the SPD and are not made to appear  
12 unimportant. Mellor Decl. ¶ 4, Ex. A, at 40-41. Thus, this  
13 argument does not prevent Aetna's recovery as a matter of law.  
14

#### CONCLUSION

16 For the foregoing reasons, the Court GRANTS Aetna's Motion  
17 for Summary Judgment (Docket No. 35) and DENIES AS MOOT Aetna's  
18 Motion to Strike Portions of the Declaration of Andrew Klimenko  
19 (Docket No. 45). Aetna is entitled to the imposition of a  
20 constructive trust and equitable lien on the settlement funds  
21 recovered by Defendants from Ms. Warren totaling \$144,628.56, plus  
22 accumulated interest, which are currently held in the client trust  
23 account for The Dolan Law Firm, and of which the Plan is the  
24 rightful owner. Defendants are directed to turn over these funds  
25 to Aetna on behalf of the Plan in compliance with the terms set  
26  
27  
28

1 forth in the Stipulation and Order Regarding Deposit of Disputed  
2 Funds (Docket No. 34).

3 Aetna may file a motion for attorneys' fees and costs within  
4 fourteen days of entry of judgment. As the successful party in  
5 this action, Aetna is entitled to move to recover the reasonable  
6 attorneys' fees and costs it has incurred in prosecuting this  
7 action, the amount of which shall be determined by post-judgment  
8 motion. 29 U.S.C. § 1132(g)(1). Pursuant to Civil Local Rule  
9 54-5, the parties are ordered to meet and confer regarding Aetna's  
10 motion for attorneys' fees within fourteen days of entry of  
11 judgment.

13 IT IS SO ORDERED.  
14

15 Dated: **11/2/2011**  
16

  
CLAUDIA WILKEN  
United States District Judge